

DEC 14 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-174

MEAD JOHNSON & COMPANY,

*Petitioner,**vs.*ROBERT J. GOODMAN, individually and as Executor
of the Estate of FLORENCE L. GOODMAN, deceased,*Respondent.***On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Third Circuit****PETITIONER'S REPLY BRIEF**

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PETITIONER'S REPLY BRIEF

Petitioner briefly replies to the brief filed by the respondent in this matter in opposition to the petition for a writ of certiorari.

Respondent's counsel in his brief, characteristically, quotes short sentences from the opinion in *Lopez v. Swyer*, 52 N.J. 267, 300 A2d 563 [1973] without reference to the

surrounding language and footnotes. Footnote 3 to the opinion, which refers to the single sentence quoted by respondent at page 4 of his brief makes clear that the discovery issue is for a judge even though he may in an appropriate case go forward with the trial before ruling on the limitations defense. Counsel's quotation at page 11 is misleading because it is in the middle of a paragraph which sets forth succinctly why the discovery issues are to be decided by a judge.

The carefully reasoned decision intertwining the liberalization of limitations restrictions with an equitable determination by a judge is reflected in the opinion and footnotes in *Lopez*, supra, and in *Fox v. Passaic General Hospital*, 71 N.J. 122, 363 A2d 341 [1976]; *Moran v. Napolitano*, 71 N.J. 133, 363 A2d 346 [1976].

There is nothing in federal court practice which is inconsistent with or contrary to the procedure set forth in *Lopez*, supra. Nothing prevents the federal courts, carrying out the mandate of state law in a diversity case, from following the procedure adopted by the trial judge in this case. See Rule 39 (a), 42 (b), 52 (a).

Objection is also made to respondent's appendix which consists of a letter and a copy of a news release. Neither document is evidentiary and neither is a part of the record of the case. The news release deals with the use of "Oracon" as an oral contraceptive. There is no dispute that during the brief period the product was used by Mrs. Goodman, it was not for oral contraception, the use for which it was manufactured. It was prescribed by Mrs. Goodman's physician who selected this pill as medication because it had estrogen, not because it was an oral contraceptive.

The manner in which these documents are appended is not authorized by the Rules of this Court. Rules 24, 39 and 36. They should be stricken.

Respectfully submitted,

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